

date of the filing of the registration statement that does not reference a securities offering that is or will be the subject of a registration statement shall not constitute an offer to sell, offer for sale, or offer to buy the securities being offered under the registration statement for purposes of section 5(c) of the Act, provided that the issuer takes reasonable steps within its control to prevent further distribution or publication of such communication during the 30 days immediately preceding the date of filing the registration statement.

(b) The exemption in paragraph (a) of this section shall not be available with respect to the following communications:

(1) Communications relating to business combination transactions that are subject to Rule 165 (§ 230.165) or Rule 166 (§ 230.166);

(2) Communications made in connection with offerings registered on Form S-8 (§ 239.16b of this chapter), other than by well-known seasoned issuers;

(3) Communications in offerings of securities of an issuer that is, or during the past three years was (or any of whose predecessors during the last three years was):

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, each as defined in Rule 405 (§ 230.405); or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter); or

(4) Communications made by an issuer that is:

(i) An investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*); or

(ii) A business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(c) For purposes of this section, a communication is made by or on behalf of an issuer if the issuer or an agent or representative of the issuer, other than an offering participant who is an underwriter or dealer, authorizes or approves the communication before it is made.

(d) A communication exempt from section 5(c) of the Act pursuant to this section will not be considered to be in connection with a securities offering registered under the Securities Act for purposes of Rule 100(b)(2)(iv) of Regulation FD under the Securities Exchange Act of 1934 (§ 243.100(b)(2)(iv) of this chapter).

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§ 230.164 Post-filing free writing prospectuses in connection with certain registered offerings.

PRELIMINARY NOTES TO § 230.164. 1. This section is not available for any communication that, although in technical compliance with this section, is part of a plan or scheme to evade the requirements of section 5 of the Act.

2. Attempted compliance with this section does not act as an exclusive election and the person relying on this section also may claim the availability of any other applicable exemption or exclusion. Reliance on this section does not affect the availability of any other exemption or exclusion from the requirements of section 5 of the Act.

(a) In connection with a registered offering of an issuer meeting the requirements of this section, a free writing prospectus, as defined in Rule 405 (§ 230.405), of the issuer or any other offering participant, including any underwriter or dealer, after the filing of the registration statement will be a section 10(b) prospectus for purposes of section 5(b)(1) of the Act provided that the conditions set forth in Rule 433 (§ 230.433) are satisfied.

(b) An immaterial or unintentional failure to file or delay in filing a free writing prospectus as necessary to satisfy the filing conditions contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as:

(1) A good faith and reasonable effort was made to comply with the filing condition; and

(2) The free writing prospectus is filed as soon as practicable after discovery of the failure to file.

(c) An immaterial or unintentional failure to include the specified legend in a free writing prospectus as necessary to satisfy the legend condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act

or the loss of the ability to rely on this section so long as:

(1) A good faith and reasonable effort was made to comply with the legend condition;

(2) The free writing prospectus is amended to include the specified legend as soon as practicable after discovery of the omitted or incorrect legend; and

(3) If the free writing prospectus has been transmitted without the specified legend, the free writing prospectus must be retransmitted with the legend by substantially the same means as, and directed to substantially the same prospective purchasers to whom, the free writing prospectus was originally transmitted.

(d) Solely for purposes of this section, an immaterial or unintentional failure to retain a free writing prospectus as necessary to satisfy the record retention condition contained in Rule 433 will not result in a violation of section 5(b)(1) of the Act or the loss of the ability to rely on this section so long as a good faith and reasonable effort was made to comply with the record retention condition. Nothing in this paragraph will affect, however, any other record retention provisions applicable to the issuer or any offering participant.

(e) *Ineligible issuers.* (1) This section and Rule 433 are available only if at the eligibility determination date for the offering in question, determined pursuant to paragraph (h) of this section, the issuer is not an ineligible issuer as defined in Rule 405 (or in the case of any offering participant, other than the issuer, the participant has a reasonable belief that the issuer is not an ineligible issuer);

(2) Notwithstanding paragraph (e)(1) of this section, this section and Rule 433 are available to an ineligible issuer with respect to a free writing prospectus that contains only descriptions of the terms of the securities in the offering or the offering (or in the case of an offering of asset-backed securities, contains only information specified in paragraphs (a)(1), (2), (3), (4), (6), (7), and (8) of the definition of ABS informational and computational materials in Item 1101 of Regulation AB (§ 229.1101 of this chapter), unless the issuer is or

during the last three years the issuer or any of its predecessors was:

(i) A blank check company as defined in Rule 419(a)(2) (§ 230.419(a)(2));

(ii) A shell company, other than a business combination related shell company, as defined in Rule 405; or

(iii) An issuer for an offering of penny stock as defined in Rule 3a51-1 of the Securities Exchange Act of 1934 (§ 240.3a51-1 of this chapter).

(f) *Excluded issuers.* This section and Rule 433 are not available if the issuer is an investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1 *et seq.*) or a business development company as defined in section 2(a)(48) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(48)).

(g) *Excluded offerings.* This section and Rule 433 are not available if the issuer is registering a business combination transaction as defined in Rule 165(f)(1) (§ 230.165(f)(1)) or the issuer, other than a well-known seasoned issuer, is registering an offering on Form S-8 (§ 239.16b of this chapter).

(h) For purposes of this section and Rule 433, the determination date as to whether an issuer is an ineligible issuer in respect of an offering shall be:

(1) Except as provided in paragraph (h)(2) of this section, the time of filing of the registration statement covering the offering; or

(2) If the offering is being registered pursuant to Rule 415 (§ 230.415), the earliest time after the filing of the registration statement covering the offering at which the issuer, or in the case of an underwritten offering the issuer or another offering participant, makes a *bona fide* offer, including without limitation through the use of a free writing prospectus, in the offering.

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§ 230.165 Offers made in connection with a business combination transaction.

PRELIMINARY NOTE: This section is available only to communications relating to business combinations. The exemption does not apply to communications that may be in technical compliance with this section, but have the primary purpose or effect of conditioning the market for another transaction, such as a capital-raising or resale transaction.